

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEW HAMPSHIRE

Ronald Bourdon

v.

Civil No. 15-cv-138-LM

Michelle Goings, Warden,
Northern New Hampshire
Correctional Facility

REPORT AND RECOMMENDATION

Before the court are two motions (Doc. Nos. 50, 51) filed by petitioner, Ronald Bourdon, seeking leave to file an in forma pauperis ("IFP") appeal of this court's August 16, 2017 Order and Judgment (Doc. Nos. 47, 48). The Order at issue approved the magistrate judge's July 18, 2017 Report and Recommendation ("R&R") (Doc. No. 45), which found that Bourdon's petition for writ of habeas corpus, filed under 28 U.S.C. § 2254, was a "mixed petition," see Aug. 16, 2017 Order (Doc. No. 47). The court dismissed the petition without prejudice on that ground, and declined to issue Bourdon a certificate of appealability. See Aug. 16, 2017 Order (Doc. No. 47).

Standard

In determining whether an applicant may proceed IFP on appeal, pursuant to 28 U.S.C. § 1915(a) and Fed. R. Civ. P.

24(a), this court considers, among other things, the applicant's objective good faith. See 28 U.S.C. § 1915(a)(3); Coppedge v. United States, 369 U.S. 438, 445 (1962). An appeal is frivolous if it lacks any rational, arguable basis in law or fact. See Santiago-Lugo v. United States, 94 F. Supp. 3d 156, 158 (D.P.R. 2015).

Discussion

Bourdon is seeking to proceed IFP on appeal without having obtained a certificate of appealability from the district court. Although courts have concluded that the standard for granting a motion to proceed IFP on appeal is not the same as the standard for granting a certificate of appealability, see Walker v. O'Brien, 216 F.3d 626, 632 (7th Cir. 2000); Richardson v. United States, No. 09-cv-30079-MAP, 2010 U.S. Dist. LEXIS 117385, at *3, 2010 WL 4450446, at *1 (D. Mass. Oct. 14, 2010) (IFP standard is "somewhat lower"), R&R adopted, 2010 U.S. Dist. LEXIS 117351, at *2, 2010 WL 4450408, at *1 (D. Mass. Nov. 4, 2010), that difference in this case is inconsequential. The district judge approved the July 18, 2017 R&R, which concluded that reasonable jurists could not disagree as to whether Bourdon's § 2254 petition was subject to dismissal for lack of complete exhaustion. See July 18, 2017 R&R (Doc. No. 45), approved by

Aug. 16, 2017 Order (Doc. No. 47). Under such circumstances, Bourdon's appeal lacks any arguable basis in law or fact.

Therefore, the district judge should deny both of Bourdon's motions (Doc. Nos. 50, 51) to proceed IFP on appeal in this matter. Any objections to this Report and Recommendation must be filed within fourteen days of receipt of this notice. See Fed. R. Civ. P. 72(b)(2). The fourteen day period may be extended upon motion. Failure to file objections within the specified time waives the right to appeal the district court's order. See Santos-Santos v. Torres-Centeno, 842 F.3d 163, 168 (1st Cir. 2016).


Andrea K. Johnstone
United States Magistrate Judge

September 5, 2017

cc: Ronald Bourdon, pro se
Elizabeth C. Woodcock, Esq.